1966

Brent Wheeler, A Minor By Arlene Turley, His Guardian Ad Litem, and Arlene Turley v. Dennis C. Jone's and Charles R. Jones, Dba Sunplay Pool and Garden Center : Brief of Appellants

IN THE SUPREME COURT
of the
STATE OF UTAH

BRENT WHEELER, A Minor by Arlene Turley, His Guardian Ad Litem, and ARLENE TURLEY,
Plaintiffs-Respondents,

vs.

DENNIS C. JONES and CHARLES R. JONES, dba SUNPLAY POOL AND GARDEN CENTER,
Defendants-Appellants.

Case No. 10597

BRIEF OF APPELLANTS

Appeal From The Judgment Of The Second District Court For Weber County
The Honorable John F. Wahlquist, Judge

HANSON & BALDWIN
ROBERT W. BRANDT, Esq.
909 Kearns Building
Salt Lake City, Utah
Attorneys for Appellants

RICHARD H. THORNLEY, Esq.
200 Kiesel Building
Ogden, Utah
Attorney for Respondents

INDEX

CASES CITED

INDEX—Continued

AUTHORITIES & TEXTS CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

BRENT WHEELER, A Minor by Arlene Turley, His Guardian Ad Litem, and ARLENE TURLEY,
Plaintiffs-Respondents,

vs.

DENNIS C. JONES and CHARLES R. JONES, dba SUNPLAY POOL AND GARDEN CENTER,
Defendants-Appellants.

Case No. 10597

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

The appellants, co-owners of a garden and swimming pool supply store in Ogden, Utah, appeal from a jury verdict on special interrogatories in favor of the respondents for damages allegedly sustained as the result of the plaintiff Brent Wheeler walking through a glass door on the premises leased by the defendants.

DISPOSITION IN LOWER COURT

The plaintiff by and through his guardian ad litem filed suit in the District Court of Weber

County against the defendants for injuries allegedly sustained when he walked through a glass sliding door on the premises leased by the defendants. The plaintiff Arlene Turley, the guardian ad litem and mother of the respondent Brent Wheeler, sought damages for the special expenditures which she made on behalf of her son as a result of the accident. The case was tried on the 16th day of December, 1965 on jury trial before the Honorable John F. Wahlquist, Judge. The matter was submitted to the jury on special interrogatories. The jury determined that the defendants were negligent in failing to maintain glass of sufficient strength in the door involved to have prevented the accident which negligence the jury found to be the proximate cause of the respondent's damages. Subsequent to the jury's verdict, a motion for new trial was filed by the appellants which was denied by the trial judge upon condition that the respondents accept the reduction in the verdict of 5 per cent. The respondents accepted the reduction, and the appellants filed their appeal to this court from the judgment entered on the verdict.

RELIEF SOUGHT ON APPEAL

The appellants submit that the trial court committed serious and prejudicial error at the time of trial and that the evidence warrants reversal as a matter of law.

STATEMENT OF FACT

The appellants submit the following Statement of Facts. The appellants, father and son, were in 1963 operating a business in Ogden, Utah known as Sunplay Pool & Garden Center (T-p. 119). The real property where the Sunplay business was being conducted was owned by a Dr. Naisbitt (T-120). There was a building and a swimming pool on the premises and the appellants had taken a lease from Dr. Naisbitt of the property which had previously been under lease to a Mr. Claude Huss (T-120-121). The lease that Mr. Huss had previously had was relinquished and the appellants took over the remaining portion of Mr. Huss' lease and also executed a new lease with Dr. Naisbitt. The business was principally a garden and swimming pool supply business (R-121). According to Mr. Charles R. Jones, the premises were in approximately the same condition at the time of the respondent Wheeler's accident as when the appellants leased the premises (T-122).

The appellants on an appointment basis would allow children to use their swimming pool, which was maintained for display purposes and to assist in the appellants' business of selling swimming pools and swimming pool supplies. Children were allowed to swim in the pool on the basis of 20¢ for a two hour period (T-94, 130). The appellants never allowed more than 12 children to use the pool at any

one time (T-131). The appellants employed a Mr. James Hill to assist in the maintenance of the property and to act as a lifeguard (T-158, 160). On the day in question, the appellants had also employed a Mr. Dennis Ball, who worked on a part-time basis taking care of the pool along with Mr. Hill (T-147). The premises consisted of a double chain link fence, swimming pool and a building, where the appellants kept their equipment and supplies, which was immediately adjacent to the pool. Appellants also had candy in the building adjacent to the pool which they sold to the children using the pool (T-172, 165).

On August 21, 1963, Brent Wheeler, who was then 12 years of age and who had been to the pool approximately three times before in 1963, made reservations to swim in appellants' pool from 12 noon to 2:00 p.m. (T-92-93). The respondent, Brent Wheeler, and four of his friends paid the appellants 20¢ for the use of the pool and started to swim. Prior to entering the pool, Brent entered through the sliding glass door into the outside area of the pool. After swiming for awhile, he went back into the building to check the time. He re-entered the building through the same door which was later involved in the acident (T-95). He stated that the door had been all the way open at the time he had first entered the building to pay his 20¢ and to go into the pool area. He stated that when he went in to check the time, he observed the door had been

closed part way (T-95). According to Brent, he looked at the clock over by the cash register in the building. He testified (T-96):

> "Q. Okay. What did you do after you saw what time it was?
>
> "A. I reset my watch and t u r n e d around and looked through the door and I walked,and I looked through it again and hit the glass.
>
> "Q. Okay. Now, when you turned around the first time and looked, what did you see?
>
> "A. Just the bar with two sides is all. I didn't see anything on either side of it."

According to the respondent Wheeler's testimony, he looked at the door when he was approximately 10 feet away, then looked at his watch, again looked at the door when he was approximately 4 feet away, looked down and walked into the door (T-97). After bumping into the glass door Brent walked through the glass to a point approximately 4 feet beyond the door (T-100). On cross-examination, he testified (T-110)

> "Q Oh, I'm sorry. You told us that. You looked at your watch and looked at the door and you were about ten feet away. Is that right?
>
> "A I looked before I started out.
>
> "Q You were about ten feet away.
>
> "A Yes.

"Q And then you say you looked down at your watch?

"A Yes.

"Q As you walked along?

"A Yes.

"Q And that you looked again when you say you were four feet away?

"A Yes.

"Q And then you looked at your watch and continued walking.

"A Yes.

"Q *As far as you know you didn't look again.*

"A *Only the twice.*

"Q Only the twice. I take it you hadn't gotten your clothes at that time. They were still out by the pool?

"A Yes."

As a result of the collision with the door, the glass broke and Brent Wheeler sustained cuts to his arms and legs necessitating medical treatment and hospitalization.

Brent Wheeler testified that there was no decal or other metal stripping on the glass at the time he walked into the door. Mr. Charles R. Jones testified that he didn't recall whether there was a decal on the day of the accident (T-125) but that he had previously placed a decal on the door near the handle approximately 4 feet from the ground. The decal

was a large transparent yellow and blue decal 8 to 10 inches in diameter (T-124). Presence of the decal in the past was corroborated by Mr. Dennis Jones (T-143-144). It was admitted that there was no divider bar or metal tape on the door. Mr. James Hill testified that when he cleaned up the glass he picked up a large piece of glass which was connected to a small piece by a piece of paper or other substance which could have been a decal (T-168). He also indicated that he recalled a decal on the glass sometime before the accident, but he couldn't specifically say whether it was there at the time of the accident (T-168-169). Mrs. Lea Jones, the wife and mother of the appellants, testified that she cleaned the glass doors on the Sunday immediately before the accident (T-181). She stated at that time there was a decal on the sliding door half way up in the center near the handle (T-182). She stated this is the only time she cleaned the windows and that she had a specific recollection of the decal (R-182-189). Dennis Ball indicated that he had a clear recollection of having seen the decal prior to the accident but could'nt say for certain whether it was there on that day (R-150).

The deep end of the pool was located near the door swimmers jumping into the pool would slash water on the door leaving water marks which could be observed by a person looking through the door.

Mr. Ralph Hill testified that subsequent to the accident, while he was giving first aid to the re-

spondent Brent Wheeler, that the boy had a jawbreaker in his cheek and he told him to spit it out and the respondent Brent Wheeler did so (T-165). The Wheeler boy denied that he had a jawbreaker (T-192) although this candy was sold at the Sunplay premises.

Bert D. Vandenberg, manager of the glass division of Bennett Glass and Paint in Ogden, testified that the glass in the door was replaced with 3/16th inch sheet glass and that replacement of broken glass is usually with the same size and quality glass as was previously in the door. Mr. Vandenberg indicated that other glass available would be safety glass with wire, tempered safety glass, or safety glass with a plastic inner-lining (T-40). Over objection, he was allowed to testify as to the use of tempered glass in schools and as to what the F.H.A. standard, as respects commercial construction, was at the time of the trial (T-43-44). He also testified as to the type of glass used in L.D.S. churches in the community (T-44). Mr. Vandenberg indicated that tempered glass would have had to have been specially ordered and that ordinary glass would not rupture unless it was exposed to a pressure of 6,000 pounds of square inch whereas tempered glass could withstand 30,000 pounds p.s.i. (T-48). On cross-examination, Mr. Vandenberg acknowledged that the F.H.A. specifications applied only to new buildings and remodeling and had no application to existing structures (T-49). He in-

dicated that the great majority of installations, approximately 95 per cent, had 3/16ths inch glass (T-50). He stated that the only way an individual could tell the difference between safety glass which was tempered and the normal 3/16ths inch plate glass would be by nipple marks which would appear near the edge of the tempered glass caused as the glass was handled during the tempering process and that this would require some knowledge of the factory processing of safety glass (T-51).

The case was submitted to the jury on special interrogatories. The jury returned a verdict, finding that the defendants were generally negligent but that they were not negligent in failure to have appropriate metal strips or a decal on the door but in failing to have glass of sufficient strength which would withstand ordinary bumping without breaking or which would remain intact after breaking. (T-226). The jury indicated that the failure to have a metal guard, decal or poster was "not proven" (T-226). The jury returned a verdict for $1,578.75 special damages and $10,000.00 general damages. The submission of the special interrogatories in the form submitted was accepted to by the appellants as were certain of the court's instructions. The contention that the court erred in giving certain instructions will be canvassed in detail in the Argument portion of the brief. The final judgment as entered by the court was for the above mentioned special damages and $9,500.00 general damages (R-19).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT FINDING THAT THE RESPONDENT BRENT WHEELER WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

The appellants contend that the trial court erred in not granting the appellants motion for directed verdict at the end of the evidence on the grounds that the plaintiff Brent Wheeler was in fact contributorily negligent as a matter of law.

The apellants are of course aware that in appraising the facts on appeal, they must be taken in a light most favorable to the jury's verdict. However, the facts when viewed in this case clearly evidence as against the applicable legal rule, the conclusion that respondent Brent Wheeler was negligent as a matter of law. Several facts are directly relevant to the contention of the appellants. First, it should be noted that the jury did not find that there was any negligence on the part of the appellants in failing to place decals or other markings upon the glass door which the respondent struck which contributed to his injuries. The testimony in this regard clearly discloses that the door was adequately marked. Mr. Charles R. Jones testified that to his knowledge there had been a decal upon the door. At one time, it had been removed and replaced with another more observable decal. Although he did not recall a decal on the door on the day of

the accident, his last specific recollection of the condition of the door was that it was adequately marked with the decal. Mr. Jones' observation was corroborated by his son, Mr. Dennis Jones, a co-owner and operator of the Sunplay activity. Mr. Dennis Ball couldn't say if there was a decal on the door on the exact day of the accident but did recall seeing a decal on the door sometime immediately prior to the alleged injury. Mr. James Hill, an employee of the apellants, testified that in cleaning up the glass, he picked up a piece of glass that appeared to be attached to another piece of glass that clearly could have been a decal or other marking. Further, Mr. Hill had no distinct recollection of a decal being on the door sometime prior to the time of the accident. Mrs. Lea Jones expressly recalled and rather definitely testifed that the decal did exist on the door the Sunday prior to the time the accident occurred. In addition to the testimony concerning the decal, there was evidence to the effect that the pool had been available for swimming at least two days immediately prior to the time of the accident and that because the deep end of the pool was nearest the door that often during the course of the use of the pool water was splashed upon the sliding door leaving visible water marks. This evidence, coupled with the jury's conclusion that the absence of a decal or metal stripping in no way contributed to the accident, lends to the conclusion that there was no negligence on the part of the appellants in failing

to maintain the premises in such a manner, that had the respondent Brent Wheeler observed what was reasonably subject to observation the accident would have been avoided.

In addition, the evidence clearly seemed to support the inference that the respondent Brent Wheeler, who was injured as the result of his walking into the glass, sustained the injury as a result of his own activities. The conclusion is supported by the respondent's own testimony that he had been upon the premises on at least three prior occasions. Consequently, it must be concluded that there was at least some familiarity with the general layout of the premises and the nature of the physical structure of the Sunplay operation. On the day in question, Brent Wheeler had entered the premises, gone through the glass door and particularly observed that the glass door was open. He thereafter swam and re-entered the building adjacent to the pool in order to determine the time. Again his recollection was specific as to the position of the door. His testimony was that at that time the door had been partially closed. He observed the clock and approximately 10 feet from the clock on the inside of the door, looked to the door, glanced down, looked at his watch, again observed the door and then walked directly into the door. There was nothing to indicate the door was in disrepair and the jury's determination that the condition of the door in no way contributed to the cause of the accident, viz-a-viz decal or other mark-

ings, clearly evidences that the injuries of Brent Wheeler were directly the result of his failure to keep an appropriate lookout and thus his own negligence. Other facts of record support the conclusion that Brent Wheeler was in fact failing to observe dangers that might have caused the accident as a result of his own wrongdoing. The boy acknowledged that the store sold candy as did the proprietors of the Sunplay Pool activity. Mr. James Hill indicated that in the course of administering first aid that the respondent Brent Wheeler had a jawbreaker in his mouth which he told him to spit out and that Brent Wheeler did so. The store sold such candy and there was no evidence that the Wheeler boy purchased any of the candy available for sale by the store. The conclusion is obvious that the young Wheeler boy, whether he entered the premises for the purpose of checking the clock or not, took a piece of candy and in his effort to avoid detection, failed to observe the glass door which was otherwise adequately marked and if he had used reasonable caution on his own behalf would have been obvious and the acident avoided. There is absolutely no evidence that the actions of the appellants were the sole and proximate cause of the acident. Under similar circumstances, the case law is overwhelming to the effect that as a matter of law the respondent, Brent Wheeler, was contributorily negligent. All the testimony which appears of record, other than that of the respondent Brent Wheeler was to the effect

that a decal was in fact upon the glass approximately 4 feet high near the handle of the door. The jury in finding that the absence of any markings was not a contributory cause to the accident obviously determined that Brent's testimony was not to be believed to the extent that he indicated there was no decal on the door at the time he struck it. In support of this conclusion, the testimony of Brent Wheeler is itself dispository since he apparently was not observing the glass at the time he walked into it.

In *Rosenberg v. Hartman*, 313 Mass. 54, 46 N.E.2d 406 (1943), the court held that where the plaintiff, a customer of the defendant's store, entered an open door which in the meantime had been closed and where there was no indication of any defect in the door and where it was possible from a construction of the evidence that there were fittings on the door which he should have observed where the plaintiff struck the door walking through it sustaining injuries, there was no evidence of negligence on the part of the defendant. In the instant case, there is not only evidence of a decal on the door, there is also evidence of a sign, adjacent to the sliding door portion which should have been visible, and if Mrs. Jones' testimony is to be believed, the sign was on the sliding portion of the door[1]. In addition, a water slide was partially protruding across the sliding portion of the door which

1 The sign apparently had the phone numbers where the proprietors of the Sunplay activity could be reached.

should have given any observant person an opportunity to see the door and avoid danger. The *Rosenberg* case is cited not necessarily for the proposition that the appellant was not negligent but for the proposition that under the particular circumstances of the case, there could be no finding that the activity of the appellants was the sole and proximate cause of the respondent Brent Wheeler's injury.

In similar circumstances, in the case of *Flynn v. F. W. Woolworth Co.*, 155 N.E. 2d 176 (Mass. 1959), the Supreme Judicial Court of the State of Massachusetts again found that where the plaintiff sustained injuries while walking through a glass door in no particular hurry and with knowledge of the existence of the door, there could be no finding in favor of the plaintiff. This case, when taken in conjunction with the *Rosenberg* decision, indicating that glass doors are a relatively common occurrence or everyday experience which a reasonably observant person would be aware of or should anticipate, indicates that the accident in the present case was the direct and proximate result of the activity of the respondent. A similar result was reached by our sister state in the case of *Home Public Market v. Newrock*, 111 Colo. 428, 142 P.2d 272 (1943).

In *Crawford v. Given Bros.*, 318 S.W.2d 123 (Tex. 1958), the court held that where a seven year old boy, a patron of the defendants' store, struck

a glass panel and sustained injuries, a judgment in favor of the plaintiff would be set aside on the grounds that the design of the building and other accommodations did not demonstrate any architecturally unsound or unsafe activity and that no duty was owed to maintain any special type of warning.

In *Dukek v. Farwell, Ozmun, Kirk & Co.*, 248 Minn. 374, 80 N.W.2d 53 (1956), the court ruled that the defendant, a Western Union messsenger boy, in a suit against a store owner for injuries sustained when the boy walked into a glass panel, was contributorily negligent. The facts indicate circumstances substantially comparable to those in the instant case. The court noted that there was nothing particular about the construction to distract the plaintiff and nothing to prevent his seeing the door and distinguishing the doors from the adjacent panel. The court concluded that it was inescapable that the plaintiff received his injuries as the result of failure to observe the direction in which he was moving. Similar conclusions were reached by the Texas court in *A. C. Burton v. Stansy*, 223 S.W.2d 310 (Tex. 1949) and *Acme Laundry Co. v. Ford*, 284 S.W.2d 745 (Tex. 1955).

In *Pettigrew v. Nite-Cap, Inc.*, 63 So.2d 492 (1953 Fla.), the trial court directed the verdict in favor of the defendant. On appeal, the determination was affirmed. The plaintiff walked into a large plate glass door at the entrance to the defendant's

restaurant. It was alleged that the glass was colorless, void of markings or handles or other visible objects. A situation more extreme than this case. The appellate court noted that the door was of clear glass but that there was a wide metal strip on the top and bottom of the door. Black knobs were placed in a convenient area for the movement of the door. The court indicated that the sole and proximate cause of the injury was the failure of the plaintiff to see that which by exercise of reasonable care she could have seen. This case is presented to the Court for the proposition that, under the facts of the instant case where there were observable markings and where the testimony of the injured party himself indicated that he failed to keep a reasonable lookout warrants a determination that the respondent Brent Wheeler was contributorily negligent as a matter of law.

A result very comparable was reached in *Stone v. Hotel Seville, Inc.*, 104 So. 2d 847 (Fla. App. 1958). The California Court of Appeals reached a similar conclusion in *Maidman v. Metropolitan Trading Co.*, 166 Cal.App.2d 205, 332 P.2d 807 (1958) where the plaintiff struck a large heavy plate door. See also, *Brand v. Pope*, 103 Ga.App. 489, 119 S.E. 2d 723 (1961), where the court sustained a motion to dismiss by the defendant in an action by a social guest for damages as the result of an injury sustained in walking into a sliding glass door.

It is admitted that there may be cases where a contrary result has been reached (a) upon the contention that through the facts of the *particular* case a jury question was presented on the basis of contributory negligence. However those cases seem to clearly be based upon a failure of the proprietor of the premises to place decals or other warning signs in the vicinity of the door or upon the failure of the premises to have other objects which would attract the attention of the injured person to the danger involved. In this particular case, the jury expressly found that the contention of the plaintiff that the failure to have appropriate markings or objects which would attract the attention of the injured party to the danger was "not proven". Other cases which support the contention of the appellants under comparable circumstances are *Bryant v. Ludendi Roller Drome, Inc.*, 150 So.2d 55 (La. App. 1963); *Brown v. Alabama Foods Incorporated*, 190 Atl.2d 257 (Dist. Columbia Appeals applying Maryland law). In the latter case, the District of Columbia Appellant Court noted that a super market customer injured as the result of striking a glass panel and who was familiar with the premises was negligent as a matter of law. The same situation is clearly sustained by the testimony of the respondent Brent Wheeler in the instant case.

Based upon the evidence taken in a light most favorable to the respondent, Brent Wheeler, and particularly with reference to his own testimony it

is clear that the accident occurred as the direct result of the contributory negligence of Brent in failing to keep a proper lookout for his own safety, failing to observe what was observable, and in failing to exercise the reasonable care which a prudent boy under the same or similar circumstances would have exercised.

It may be that in an appropriate case, the facts would indicate that the striking of a glass door by a young child would present a jury question and that it would be improper for an appellate court to overturn the jury's determination. However, in this case, the jury expressly found the failure to have markings or decals in a place observable by the injured person was not a cause of the accident. It is, of course, acknowledged that the jury determined that the acivities of Brent Wheeler were not a contributing cause to the accident, however this clearly ignores the undisputed factual testimony from the mouth of the respondent himself. It is submitted that, in the absence of a legislative determination that compensation should be awarded in cases comparable to the instant one, this Court is duty bound to reverse. Many cases from this Court support a conclusion that the failure of Brent Wheeler to observe the glass door renders him contributorily negligent. These cases are relevant to Point III of this Brief and are therefore discussed under that point to avoid duplication.

POINT II

THE TRIAL COURT ERRED IN SUBMITTING INTERROGATORIES TO THE JURY WHICH WOULD ALLOW THE JURY TO FIND THAT THE APPELLANTS WERE NEGLIGENT IN FAILING TO HAVE GLASS IN THE SLIDING DOOR ON THE PREMISES, LEASED BY THE APPELLANTS, OF SUCH A STRENGTH THAT NO INJURY COULD HAVE OCCURRED TO THE RESPONDENT BRENT WHEELER WHEN HE STRUCK THE DOOR, SINCE UNDER THE FACTS OF THIS CASE, (A) THE EVIDENCE DID NOT JUSTIFY SUCH AN INSTRUCTION; (B) THE IMPOSITION OF SUCH A BURDEN UPON THE APPELLANTS EXCEEDED THE USUAL STANDARD OF CARE REQUIRED OF THE OCCUPIER OF PREMISES ALLOWING THE PREMISES TO BE USED BY BUSINESS INVITEES; (C) THE INTERROGATORY PRESENTED TO THE JURY A STANDARD INAPPROPRIATE TO THE FACTS OF THIS INSTANT CASE.

The basis upon which the jury determined that the appellants were negligent and that the respondents should recover is set forth on page 226 of the record. The jury determined that the appellants were negligent "in maintaining a glass of a thickness or a type in the sliding door in question insufficient to withstand ordinary bumping without breaking or which would remain intact after breaking."

An exception to the court's submission of the special interrogatory was taken by the appellants on the grounds that the interrogatory given by the court on the issue of the thickness of the glass was misleading (T-199, 200).

There was no evidence introduced to show that the "thickness" of the glass in the sliding door on the premises maintained by the appellants was not sufficient. The glass was 3/16ths inch thick. *No testimony on the "thickness" issue was offered.* The testimony of the respondents' expert, Mr. Burt D. Vandenberg, was to the effect that other safety glass which is sometimes used in sliding doors was of approximately the same thickness but would either be tempered or inmeshed with wire or supported by plastic innerplate. The testimony given by Mr. Vandenberg was to the effect that tempered glass was used in schools in the area, and was required by F.H.A. standards subsequent to the time the building occupied by the appellants was built. Also evidence was offered that some L.D.S. churches required tempered doors. Assuming the admissibility of such evidence, there is no showing that this related to the particular building in question or that the glass in the building, 3/16th inch, was not otherwise adequate. In fact, the testimony of Mr. Vandenberg was that 95 per cent of the glass installed in the community was 3/16th inch glass was not safety glass. His testimony was to the effect that 3/16th inch glass would withstand pressure of up to 6,000 pounds per square inch. There was no evidence that a structural strength of up to 6,000 pounds per square inch was not adequate to protect against "ordinary bumping". In addition, even though there was testimony to the effect that tempered glass

would withstand a pressure of 30,000 pounds per square inch, there was no evidence as to the effect of ordinary bumping on glass so that a force 30,000 pounds per square inch could be concluded to actually protect against the impact which occurred in the instant case.

Of extreme importance is the fact that the only way an individual could tell whether safety glass or normal 3/16th inch glass had been placed in the sliding door which the respondent Brent Wheeler struck would be by observation of tiny little nipple marks which would have been placed upon the glass during the tempering process. This required expert knowledge (T-51).

In *Quinn v. Utah Gas & Coke Co.*, 42 Utah 113, 129 P. 362 (1912), this Court indicated, speaking of the duty of a business invitee:

> "It was its duty to exercise ordinary care and diligence to provide and maintain a reasonably safe place for ingress and egress to and from its place of business for its customers, and to exercise the same degree of care and diligence to prevent injury to them and to their property while they were lawfully in its place of business or on its premises. Appellant, however, was not an insurer of the safety of its customers; nor was it required to avoid all accidents; either to them or to their property, at its peril. The respondent, therefore, was required to show that appellant in some way had omitted to exercise that degree of care and diligence for her safety

> stated above, and that by reason of such want of care [her injury occurred]."

In the *Quinn* case, this Court reversed a judgment for a woman who had sustained damage to her dress as a result of spilled ink while upon the premises of the appellant paying a bill. The Court determined that there was no showing of sufficient negligence to warrant jury returning the verdict returned. The Court also concluded a more rigorous standard was not in accord with the state of the law.

In *Winterowd v. Christensen*, 68 Utah 546, 251 P. 360 (1926), this Court stated with reference to the standard of care owed by the owner or occupant of presmises to a business invitee:

> "* * * It is well settled that the owner or occupant of premises who induces others to come upon it by invitation express or implied owes to them the duty of using *reasonable or ordinary care to keep the premises in safe and suitable condition, so that they will not be unnecessarily or unreasonably exposed to danger.*"

Recently, in *DeWeese v. J. C. Penney Co.*, 5 Utah 2d 116, 297 P.2d 898 (1956), this Court again acknowledged that store owners are not insurers of the safety of their patrons. The Court indicated that the standard of care to be applied was that only of ordinary and reasonable care under the circumstances. This Court stated:

> "The essential inquiry relating to defendant's negligence is whether in performing its duty of due care just recited, it knew or should have known, that a dangerous condition existed and whether sufficient time elapsed thereafter that, in due care, it should have [corrected the problem]."

There is, of course, no doubt that the respondent Brent Wheeler was a business invitee on the premises of the appellants, *In re Wimmers Estate*, 111 Utah 444, 182 P.2d 119 (1947). However, that does not, based upon the above cases, require the invitor to exercise other than ordinary care for the safety of his patrons. He does not become an insurer of his premises, nor is he required to be put to excessive or unreasonable burdens in determining that the premises are safe for the invitee. Prosser, Torts, 3rd Edition, p. 403, states:

> "On the other hand there is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it."

The alleged defect claimed to constitute negligence in this case was the failure to maintain glass of sufficient strength to have prevented the injury. However, only an expert could have determined that

the glass panel on the premises of the appellants was not safety glass. Further, the glass on the premises of the appellants was used in 95 per cent of the glass installations in the community. Additionally, it should be noted that it was marked with a decal or at least the jury found that the absence of warning in no way caused the accident. Under these circumstances, it would seem that the appellants met their duty of ordinary and reasonable care and that the court erred in instructing the jury that they could find negligence from the failure to maintain glass of sufficient thickness or type as to have prevented the injury. The instruction given by the court on the standard of care required of a business invitee (Instruction No. 17) was sufficient to appraise the jury of the required standard. However, when the court expressly called to the jury's attention to the contention of inadequacy of the thickness or type of glass, it was stating to the jury that this was a requirement that the appellants must satisfy in order to meet their duty as an owner and occupier of premises where business invitees were entertained. Such a determination was one for the jury. The jury must affix the standard of care under the circumstances of this case and based upon the standard above mentioned (that the owner and occupier of premises need only use ordinary care) the trial court's interrogatory to the jury as to whether negligence could be found from the composition and type of glass was clearly error

since it imposed a greater burden than that as a matter of law. Consequently ,the action of the court requires reversal.

POINT III

APPELLANTS CONTEND THAT THE TRIAL COURT ERRED IN FAILING TO GIVE REQUESTED INSTRUCTIONS 10 AND 11.

Instruction No. 10 requested by the appellants read:

> "You are instructed that Brent Wheeler was under a duty to exercise that degree of care for his own safety which would ordinarily be exercised by an ordinarily prudent boy of the same age, capacity and experience, and in determining whether or not he met the standard of care for his own safety, you are instructed that he is charged with observing what was there to be seen."

The trial court refused the requested instruction underlining the words "observing what was there to be seen" and writing "not proper" underneath.

Requested Instruction No. 11 read:

> "Generally, human experience justifies the inference that when one looks in the direction of an object clearly visible he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

The trial court stated that the instruction was not given indicating on the instruction "situation not

as on highway, jury question, swimmers eyes may be wet, etc. Children do not drive cars but do swim, etc." An examination of the instructions given by the court reveals that in no way was the jury instructed that the respondent Brent Wheeler had an obligation to keep a proper lookout for his own safety and to observe objects which were reasonably visible.

It should be remembered that the facts in this case were to the effect that the Wheeler boy had gone through the sliding door out into the pool area to swim. He had come back in through the door, observed its condition and then set his watch, looked in the vicinity of the door twice and walked directly into the door. In addition, he had been on the premises approximately three times previous that year and was familiar with the location of the door in the building. The comments of the court to the effect that water could have been in the boy's eyes from swimming have no relationship to the facts of this case. Not one scintillia of evidence was presented that at the time of the accident the boy was suffering from any visual defect as the result of having left the swimming pool. In fact, the boy's own testimony was to the effect that he had obtained his watch from the clothes of his swimming companion and walked into the building, observed the clock, set his watch and walked out striking the glass door. At no time did he indicate that his vision was in any way obscured because of his hav-

ing been swimming. Further, there is no testimony before the court to the effect that the vision of the child would have in any way been impaired by the nature of the chemicals in the pool or water. Indeed the eyes themselves are lubricated by tear secretion. The comments of the trial court written upon the requested instruction of the appellants may have some theoretical relevance in an appropriate case but were completely without relevance to the instant fact situation. Speculation unrelated to the evidence has no place in a court's instructions. *State v. Thompson*, 110 Ut. 113, 170 P.2d 153 (1946).

It is submitted that the failure of the trial court to give the requested instructions 10 and 11 effectively deprived the appellants of presenting their theory of the law of the case to the jury. The court did instruct upon contributory negligence but left that phrase without any substance or meaning. Particular conduct that would constitute contributory negligence was not definitively spelled out to the jury. It was, of course, the theory of the appellants that the respondent Brent Wheller was contributorily negligent because of his failure to observe the door which he struck, when the door was in such a position with relation to objects in the store and the decal on the door that he was negligent in not observing it.

In *Manning v. Powers*, 117 Utah 310, 215 P.2d 396 (1950), an action was brought by the father

of a deceased child for the wrongful death of his child when the child while riding a bicycle was struck by the defendant's automobile. The trial court instructed the jury with reference to the possible contributory negligence of the deceased that:

> "The age, capacity and experience of the said [deceased] are factors which you may take into consideration together with all the evidence in the case in determining whether or not the defendant was negligent, so far as such factors were known to or in the exercise of ordinary care *could have been seen by the defendant or the* [*deceased*] was contributorily negligent. . . ."

This Court ruled that the trial court had acted properly in giving such an instruction. Thus, this Court in a case involving the death of a child correctly indicated that the child himself had an obligation to keep a proper lookout for his own safety.

In *Mingus v. Olsson*, 115 Utah 505, 201 P.2d 495 (1949), this Court imposed the duty on not only a motorist to make more than a mere glance to determine if a pedestrian was in danger, who was crossing a street in the face of an approaching vehicle, but indicated also that the pedestrian who undertakes to cross a busy street without first observing the vehicular traffic may be guilty of contributory negligence in failing to observe approaching vehicles.

Consequently, this Court has recognized that in the case of pedestrians, or children, bicyclists and

motorists, there is an obligation on the part of individuals to keep a reasonable and proper lookout for their own safety. There is no legitimate reason why this should not be applied in other instances, especially as in the instant case where the respondent Brent Wheeler had in fact been on the premises, knew the position of the door and could with reasonable caution, had he kept a proper lookout, have avoided the accident which resulted in his injury.

In *Eisner v. Salt Lake City*, 120 Utah 675, 238 P.2d 416 (1951), this Court held that there could be no excuse for a woman not noticing a depression in the sidewalk which she stepped into merely because there were a large group of children passing at the time which might have distracted her. Her forgetfulness was held to constitute contributory negligence.

In *Whitman v. W. T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964), summary judgment was granted on the ground of contributory negligence against a truckdriver delivering merchandise to the defendant's department store who was directed to go downstairs and out a door to return to his truck, where he went to the first door he saw, opened it and stepped off backward into an elevator shaft. This Court stated:

> "In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is es-

> sential that there be something which could be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger thus providing some reasonable basis for a finding that even though he exercised due care he could be excused from seeing and avoiding it."

This Court has recognized the necessity on the part of an individual in circumstances other than automobile cases to exercise due regard for his own care and to observe hazards which would normally be observed by maintaining reasonable attention.

In *Steele v. Denver & Rio Grande Western Railroad Co.*, 16 Utah 2d 127, 396 P.2d 751 (1964), this Court stated:

> "Where the hazardous condition is as easily observable to the invitee as it is to the owner, the duty to warn does not exist, *Lindsy v. Eccles Hotel Co.*, 3 Utah 2d 364, 284 P.2d 477; *DeWeese v. J. C. Penney Co.*, 5 Utah 2d 116, 297 P.2d 898, 65 A.L.R. 2d 399."

In the instant case the decals were a warning to some extent.

In *Wightman v. Bettilyon's Inc.*, 15 Utah 2d 200, 390 P.2d 120 (1964), this Court sustained summary judgment where a pedestrian, aware of conditions on a sidewalk that were encroached upon by high growing weeds and who had knowledge that there was a danger of tripping and falling, was held to have a duty to give heed to his own

safety by carefully avoiding entrapment of weeds. The Court stated:

> "Appellant was aware of the condition of the sidewalk and as a reasonably prudent person had knowledge that there was danger of tripping and falling in traveling over such a walk. Since the danger was apparent and she was aware of it, the duty was hers to give heed to her own safety by carefully observing and avoiding entrapment by weeds * * *"

It is submitted therefore that where the respondent Brent Wheeler was aware of the glass door, and familiar with the premises, he had a duty to observe that which was observable for his own protection. Therefore, the trial court should have given the instruction requested by the appellants. Further, many of the above cases support appellants' contention that Brent Wheeler was contributorily negligent as a matter of law. As noted in Point I. This Court should reverse.

POINT IV

THE TRIAL COURT MADE ERRONEOUS RULINGS ON THE ADMISSIBILITY OF EVIDENCE WHICH REQUIRE REVERSAL.

The appellants submit that the trial court made ruling on the admissibility of certain evidence proffered by the respondents which require reversal in the instant case.

The respondents' witness, Mr. Burt D. Vandenberg, was asked on redirect examination (R-52):

"Q Well, do you know how many people that had 3/16 inch glass in their glass doors put tape on the glass to draw attention to it?

"THE COURT: He is talking about the summer of 1963?

"Q Yes, in the community?

"A I can't state percentages again, but in '63 it was becoming quite aware that these sliding glass doors were dangerous.

"MR. BRANDT: Objection. I move to strike that as not responsive.

"THE COURT: It may remain. The jury may give it whatever weight they think it is entitled to."

It is submitted that the trial court committed serious error in allowing the respondents' witness to testify that sliding glass doors were dangerous. The question was the number of persons who were using metal stripping as a means of drawing attention to the doors. The dangerous condition of the doors that might have existed was not the question posed. Counsel for appellants made an immediate objection as soon as the nonresponsive answer was introduced. The objection was clearly proper since the testimony was merely a conclusion of the witness as to the danger or lack of danger from the type of door which was involved in the instant case. The aspect of danger was an issue for the jury to determine. The answer was merely a conclusion of the witness volunteered without reference to the

question asked. An immediate motion to strike was made at the first time that counsel could have acted. The trial court instead of granting the motion to strike and admonishing the jury to disregard the conclusions of the witness, indicated that the jury could give it whatever weight they thought it was entitled to. In view of the fact of Mr. Vandenberg's experience in the glass industry, the jury could have given his opinion, as to the possible dangers from these doors substantial weight. This was a conclusion the jury was not entitled to weigh because the opinion of Mr. Vandenberg as to safety standards was not asked nor was there any showing that he had any expertise in this area or that he was basing his conclusion on any factual data. This is not a case where an expert in safety is allowed to give his opinion as to some particular defect in a piece of equipment which may be directly relevant to the ultimate consideration of the jury. *Webb v. Olin Mathieson Chemical Corp.*, 9 Utah 2d 275, 342 P.2d 1094 (1958); Annotation 62 A.L.R. 2d, 1426. In the instant case, there was no indication that there was any particular defect in the door in question or sliding doors as such. The witness merely gave his opinion that sliding doors were becoming dangerous at the time the accident occurred. The aspect of danger depends not upon

any expertise but upon the conditions of use and many other factors other than the quality of glass in the door. It was apparent therefore that the trial court committed error in allowing the testimony of Mr. Vandenberg's opinion to be considered by the jury. See *Phoenix v. Camfield*, 97 Ariz. 316, 400 P.2d 115 (1965) where the Arizona court ruled that the trial court properly refused to permit an expert to testify as to his opinion with regard to the *danger of an intersection* where the facts were such that the jury could easily draw its own conclusions as to any possible danger. Since the testimony allowed to be considered by the jury went directly to the question of danger, and when this is appraised against the nature of the interrogatory submitted by the trial court on the condition of the glass, it is submitted that the action of the trial court constituted prejudicial error.

Additionally, trial court allowed Mr. Vandenberg to testify as to what the "custom as far as schools are concerned, what type of glass is put in those doors that *young people* use" (R-42). Further (R-43), the witness, Mr. Vandenberg, was allowed to testify that F.H.A. construction required that some kind of attention be directed towards glass in the door. Objection ws properly taken to each of the questions. The court said (R-44):

> "You my answer the question and the jury may consider it as to the standards of the community."

The court expressly directed the witness not to tell the particular viewpoint but to state the requirement. The question was then asked as to the custom of churches, and the witness was allowed to indicate that particularly L.D.S. churches required tempered glass to be placed in their doors. (R-44).

All of the above questions and the answers were allowed over objection of counsel. No evidence at any time was offered to show comparable conditions between the schools, the doors, the number of individuals using the door or any facts which could be said to correspond to the instant fact situation. Further, the F.H.A. construction requirements were in no way pinpointed to any particular type of building or activity. Further, the reference to churches was equally without any foundation and the reference to the requirements of L.D.S. churches from the question of admissibility of the evidence had an inherent quality of prejudice about it. At the time of the appellants' motion for a new trial, the trial court's action in admitting into evidence the testimony here challeneged was discussed upon by the court. The court's Memorandum reads (R-17):

> "The first consideration arises because the court received evidence as to standards required by the FHA in the installation and construction of sliding glass doors, and the custom and requirements in local school houses,

and customs and standards required in some local church construction, to-wit: The L.D.S. Church construction.

"The authorities appear to be divided as to whether or not the specific standards of Government Agencies, school boards, or large church groups are admissible as evidence of the general standard of the community, or as evidence of general community recognition of inherent in sliding glass doors."

It is interesting to note that the court apparently gave the evidence a better foundation in its Memorandum Decision than it had actually received at the time of its proffer. First, standards of F.H.A. were not necessarily directed to the installation and construction of sliding glass doors. Further the standards were not in effect at the time appellants occupied the premises. The customs and standards of local church construction were not detailed as to the particular types of doors or the circumstances of installation. The court apparently failed to note the obvious hearsay objection to allowing the F.H.A. standards to be admitted into evidence. Certainly better foundation was required to be laid in order to make testimony comparable to that received by the court admissible. The extent of familiarity with the standards that the witness may have had was not even a subject of inquiry. The nature of the standard and their application to particular situations was further not clearly presented. Under these circumstances, it is obvious that the evidence should

not have been permitted. It is also interesting to note that the question (T-42) as to the custom as far as schools although possibly responsive to a prior qusetion concerning schools around this area was not limited to the particular area nor was the answer apparently so limited. The question of F.H.A. construction was not tied in with the local standards. The reference to L.D.S. church construction did contain a reference to this locality but did not indicate any particular limits to the locality or what the term locality referenced. It seems to be rather well recognized that reference to a standard of care by reference to codes or standards of safety issued or sponsored by a governmental body or by voluntary asociations are not admissible. In, Proof of Facts, Salt Lake County Bar Association (1961), *Habit And Custom*, p. 15, it is stated:

> "Evidence of the conduct of others, under the same or similar circumstances, is incompetent to establish a standard of care because standard of care is fixed by the rule of substantive law. Therefore, the comparative conduct of others should not be permitted to infringe upon the substantive law wherein the standard of care is measured by ordinary care or the lack of ordinary care. *Brigham Young University v. Lillywhite*, 118 F.2d 836 (10th Cir., 1941). * * * The court, in the *Lillywhite* case, further stated that the jury must be admonished that such evidence is proper only to show what precautions were generally taken in such cases — not to establish the standard of care imposed by law upon the defendant."

The above statement should be compared with the erroneous statement of the trial court made to the jury at the time of the admission of the evidence. The trial court stated (T-44) in ruling on objection to F.H.A. standards:

> "You may answer the question, and the jury may consider it *as standards of the community.*"

Thus the trial court seemed to advise the jury that they could consider the evidence as the actual standard to be imposed as distinct from merely evidence of the appropriate standard. Indeed, the court said the F.H.A. specifications could be considered as the standards of the community. Under these circumstances, the action of the trial court in admitting evidence without appropriate admonition to the jury as to the limited purpose to be served by the admission even under the most liberal theory, reversible error was committed. See also 75 A.L.R. 2d 778; *Hercules Powder Co. v. DiSabatino*, 188 Atl.2d 529 Del. (1963); *Darnell v. Panhandle Co-op. Ass'n.* 175 Neb. 40, 120 N.W.2d 278 (1963); *Swaney v. Penden Steel Co.*, 259 N.C. 531, 131 S.E.2d 601. It is recognized that in some instances testimony as to comparable construction practices is admissible to show a particular standard in the community. Prosser, Torts, 3rd Edition, p. 160. However, there must be some relationship established to the custom and the particular claim of negligence under consideration. Morris, Custom and Negligence, 42 Columbia L. Rev.

1147 (1942); *Trindle v. Wheeler*, 133 P.2d 425 D.C. App. Cal. (1943). Since this was not done in the instant case, this Court is not called upon to consider whether it should accept a position one way or the other on the split of authority mistakenly analyzed by the trial court. Obviously, the evidence was not admissible under either standard.

In *Jenkins v. Hooper*, 13 Utah 100, 44 P. 829 (1896), this Court ruled that evidence showing the care used by other irrigation companies in cleaning their ditches was not admissible to prove that defendants used due care by cleaning their ditch at the same time and in the same way. The Court stated:

> "The care and attention which the law required the defendants to give their ditch, by way of cleaning it out or otherwise, could not be tested by the amount of care and attention given by other companies to others."
>
> * * *
>
> "The care or negligence of other men in charge of other ditches was not material to the issue in this case. The fact that other canals may have been cleaned out in the spring afforded no reasonable inference as to the alleged negligence of the defendants in issue in this case. Nor was such testimony admissible to prove a custom, to establish rights and impose duties in favor of or against persons, natural, artificial or independent of contract."

It would appear that this Court has therefore

reached a determination on at least one prior occasion that testimony of the manner in which other persons conduct their activities is not admissible to prove negligence or the absence of negligence. However, if the evidence were admissible foundation was required. Further, with reference to the admissibility of privately established safety codes to reflect upon the negligence of a defendant in a particular case, the majority rule is stated in 75 A.L.R. 2d p. 780:

> "The majority rule is that evidence of codes or standards of safety issued by governmental bodies as advisory material, but not having the force of law, is not admissible on the issue of negligence, * * *"

It is submitted that the trial court committed error in admitting the evidence above referred to on the grounds that (1) there was an inadequate foundation laid to demonstrate that the evidence was relevant and material to the issues then before the court; (2) the evidence related to care or lack of care of other individuals but the relationship of the activities conducted by other individuals was not identified as being similar to those conducted in the instant case; (3) the evidence of F.H.A. standards was not otherwise admissible, and was not applicable to the time in question. It is submitted that the

admissibility of this evidence could not help but have been considered by the jury and therefore its receipt was prejudicial error requiring reversal.

CONCLUSION

Appellants submit that in the instant case, they are entiled to a reversal of the judgment imposed against them and a order by this Court finding that the respondent Brent Wheeler was contributorily negligent as a matter of law. The facts of the instant case are such that when compared to comparable precedent from other states relating to individuals sustaining comparable injuries it *must* be concluded that Brent Wheeler's contributory negligence was established as a matter of law. Further, decisions from this State indicate that in comparable situations where an individual has observed a danger, is aware of its existence and fails to take reasonable precaution for his own safety that he will be deemed contributorily negligent as a matter of law.

In addition, the court's instructions to the jury in failing to appraise them that there was a duty on the part of the respondent, Brent Wheeler, to keep a reasonable lookout for his own safety, taking into consideration possible distraction and his age and

the circumstances surrounding the occurrence of the accident, was prejudicial error. Finally, the trial court's ruling on the admission of evidence was erorneous and allowed the jury to consider matters irrelevant and immaterial to the issue before them.

It is respectively submitted that the posture of this case compels reversal. This Court should reverse.

Respectfully submitted,

HANSON & BALDWIN
ROBERT W. BRANDT, Esq.
909 Kearns Building
Salt Lake City, Utah
Attorneys for Appellants